A **TAN BUN TEET & ORS v. TUN DR MAHATHIR MOHAMAD, PERDANA MENTERI MALAYSIA & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[APPLICATION FOR JUDICIAL REVIEW NO: WA-25-508-11-2019]
B 3 SEPTEMBER 2021

ADMINISTRATIVE LAW: *Judicial review – Judicial review against decision of authority – Renewal of mining licence – Reversal of decision on imposition of pre-conditions for renewal of licence – Allegation that Minister of Energy, Science,*
C *Technology, Environment and Climate Change unlawfully and wrongly delegated decision-making power to Cabinet – Whether decision to reverse made by Cabinet or Minister – Whether decision illegal and ultra vires – Whether decision amenable to judicial review – Atomic Energy Licensing Act 1984, s. 32*

D ***CIVIL PROCEDURE:*** *Judicial review – Application for – Judicial review against decision of appropriate authority – Renewal of mining licence – Reversal of decision on imposition of pre-conditions for renewal of licence – Allegation that Minister of Energy, Science, Technology, Environment and Climate Change unlawfully and wrongly delegated decision-making power to Cabinet – Whether decision illegal and ultra vires – Whether decision amenable to judicial review – Rules of Court 2012,*
E *O. 53*

Lynas Malaysia Sdn Bhd ('31st respondent') had obtained approval of the mining licence to produce 'rare earth oxides and carbonated' in the Gebeng Industrial Area, Pahang, subject to conditions; especially to fulfil the various
F provisions in the Atomic Energy Licensing Act 1984 ('AELA') and Environmental Quality Act 1974. A joint media statement was issued by the relevant authorities and Ministries that the temporary operational licence issued was imposed with a specific condition that the 31st respondent was to send out of Malaysia all residues produced at the Lynas Advance Material Plant, which included the product produced made from the said residue. The
G Cabinet endorsed this specific condition and in the event the 31st respondent fails to comply with the same, Lembaga Pelesenan Tenaga Atom ('30th respondent') had the right to suspend or terminate the 31st respondent's licence and order the 31st respondent to cease its operations immediately. The 30th respondent granted to the 31st respondent: a temporary operational
H licence from 3 September 2012 till 2 August 2014 ('first licence') and full operational licence for the periods of (i) 3 September 2014 till 2 September 2016 ('second licence'); (ii) 3 September 2016 till 2 September 2019 ('third licence'); and (iii) 3 September 2019 till 2 September 2020 ('fourth licence'). On 9 May 2018, after the General Election, the new Pakatan Harapan was
I elected into power. The new Government formed reviewed the Lynas project. The 30th respondent informed the 31st respondent about the imposition of pre-conditions for the renewal of the third licence ('decision

dated 4 December 2018'). The 31st respondent lodged an appeal against the imposition of the above pre-conditions. Meanwhile, the Minister ('third respondent') of Energy, Science, Technology, Environment and Climate Change ('MESTECC') issued a letter to the 30th respondent, (i) informing a Cabinet decision to extend the 31st respondent's operating licence; (ii) instructing the 30th respondent to take the necessary action in relation to the imposition of the pre-conditions imposed to renew the licence on 4 December 2018 to publish the said decision through a media statement on 15 August 2019 ('letter dated 13 August 2019'). The 30th respondent responded to the said letter and requested for several conditions to be imposed for the licence. The third respondent, in response, attached several conditions to the licence. The 30th respondent later issued a media release on the renewal of the licence for another six months with certain conditions ('decision dated 15 August 2019'). In a newspaper report, the third respondent maintained her stand of her views on the decision dated 4 December 2018 and that the decision dated 15 August 2019 was the final decision of the Cabinet. The MESTECC confirmed that the decision dated 15 August 2019 was the decision of the Cabinet. The applicants, the residents of Kuantan, Pahang, filed the present judicial review, pursuant to O. 53 of the Rules of Court 2012 to challenge the decision made by the third respondent on the appeal by the 31st respondent, *ie,* the imposition of the pre-conditions to renew the licence. In support of the application, the applicants submitted that (i) the third respondent had unlawfully and wrongfully delegated her decision-making power, conferred under s. 32 of the AELA, to the Cabinet; (ii) the decision dated 15 August 2019 was the decision of the Cabinet and not the third respondent; and (iii) the decision of the Cabinet, in reversing the decision dated 4 December 2018, was illegal and *ultra vires* of s. 32 of the AELA and was therefore null and void.

Held (dismissing application):

(1) To decide whether the decision dated 15 August 2019, in reversing the decision dated 4 December 2018, was the decision of the Cabinet or the third respondent, the media release made by the 30th respondent must be observed. The media release was made pursuant to the letter dated 13 August 2019 where the third respondent stated that (i) the Cabinet had agreed that the Lynas' operation licence was to be extended for six months upon its expiry on 2 September 2019; and (ii) the 30th respondent was to act in line with the said Cabinet's decision on the imposition of the pre-conditions stated in the letter dated 4 December 2018. What was the decision in the media release that reversed the decision dated 4 December 2018? The appeal for the decision dated 4 December 2018 was on the pre-conditions. Therefore, only matters decided on the pre-conditions would reverse the decision dated 4 December 2018. The first to 28th respondents did not make the

decision in relation to the appeal lodged by the 31st respondent. The Cabinet only decided to renew the licence. Such decision was distinct and different from the appeal lodged by the 31st respondent. Nowhere was it mentioned that the Cabinet themselves decided on the pre-conditions. Therefore, the decision dated 15 August 2019, reversing the decision dated 4 December 2018 on the imposition of the pre-conditions, was not the decision of the Cabinet; it was the decision of the third respondent. (paras 40, 42, 44, 45, 46, 48, 49, 52, 55, 56 & 60)

(2) The third respondent, being the Minister in charge of the AELA, had instructed the 30th respondent to take necessary action in relation to the imposition of the pre-conditions in the decision dated 4 December 2018. This instruction was in line with s. 32 of the AELA and fell under the third category of the decision under sub-s. 32(5) of the AELA. There was no issue and evidence that the third respondent had wrongfully and unlawfully delegated her decision-making power conferred under s. 32 of the AELA to the Cabinet. The decision was not *ultra vires* s. 32 of the AELA and was also not tainted with illegality or procedural impropriety to warrant an intervention of the court. Furthermore, the decision made by the third respondent, which was a final decision, was not amenable to judicial review, as provided by the ouster clause under s. 32(5) of the AELA. (paras 61-63, 66, 71, 73 & 80)

(3) The decision challenged by the applicants in the present judicial review application related to the issuance of the fourth licence to the 31st respondent. It was not disputed that the 30th respondent had extended the 31st respondent's operating licence for the fifth time for the period of 3 March 2020 to 2 March 2023. Therefore, the renewal of the fourth licence had been overtaken by event and the period of the licence had already expired. Moreover, the third respondent was no longer the Minister in charge. This application for judicial review was academic since the issue or matter between the parties was no longer in existence. (paras 81, 82 & 87)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener) [2018] 10 CLJ 129 FC ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 3 CLJ 593 FC ***(refd)***

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 4 CLJ 1 FC ***(refd)***

Legislation referred to:
Atomic Energy Licensing Act 1984, ss. 22, 32(5)
Federal Constitution, arts. 43, 121(1)
Housing Development (Control and Licensing) Regulations 1989, reg. 12
Prevention of Crime Act 1959, ss. 15B, 19A(1)
Rules of Court 2012, O. 53 r. 3(2)

For the applicants - Gopal Sri Ram, Dinesh Athinarayanan, Soha Deva A Arunasalam, Larissa Ann Louis, How Li Nee, Yasmeen Soh, Marcus Lee & Mannvir Baljit Singh; M/s Azri, Lee Swee Seng & Co
For the 1st to 30th respondents - Ahmad Hanir Hambaly, SFC & Ng Wee Li; FC
For the 31st respondent - Cecil Abraham, Sunil Abraham, Muzalifah Shabudin & Anne Sangeetha Sebastian; M/s Cecil Abraham & Partners

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The applicants had filed an application for judicial review proceedings pursuant to O. 53 of the Rules of Court 2012 ("ROC 2012"). The leave was granted by this court on 8 January 2020.

[2] The applicants are seeking the following reliefs:

(i) a declaration that the decision of the first respondent to the 28th respondent collectively as the Cabinet of the Government of Malaysia (under art. 43 of the Federal Constitution ("FC")) made on 15 August 2019 reversing the decision of the appropriate authority dated 4 December 2018 is *ultra vires* of s. 32 of the Atomic Energy Licensing Act 1984 ("AELA") and is therefore null, void and of no effect;

(ii) a declaration that the third respondent (Yeo Bee Yin) had unlawfully and wrongly delegated her decision-making power conferred under s. 32 of the AELA to the Cabinet of the Government of Malaysia comprising of the first respondent to the 28th respondent and therefore the decision made by the Cabinet of the Government of Malaysia (under art. 43 of the FC) on 15 August 2019 reversing the decision of the appropriate authority dated 4 December 2018, as *ultra vires* the provision of s. 32 of the AELA and is therefore null, void and of no effect;

(iii) a direction or order in the nature of *certiorari* quashing the decision of the first respondent to the 28th respondent dated 15 August 2019 that namely Lynas Malaysia Sdn Bhd ("Lynas") (31st respondent):

(a) is required to produce a plan to build a cracking and leaching facility outside Malaysia for the purposes of transferring the same currently within the Gebeng Kuantan Facility out of Malaysia;

(b) the cracking and leaching facility abroad must be built and become fully operational within four years starting from the effective licensing date;

(c) after the facility commences its operation overseas, Lynas will no longer be allowed to produce radioactive residue of more than one becquerel per gramme (Bq/g) at its plant in Pahang;

whereby the preconditions imposed by the document dated 4 December 2018 are dispensed with and/or set aside;

(iv) a direction or order in the nature of *mandamus* against the third respondent (Yeo Bee Yin) to consider and deliver her decision against the applicant's appeal and/or Lynas's appeal pursuant to s. 32 of the AELA;

(v) such other remedies and/or orders and/or directions as the justice of the case demands and be moulded according to the exigencies of the situation in order to satisfy/suit the justice of the case;

(vi) all reasonable and subsequent orders and/or directions or orders as this honourable court may be deemed fit and necessary to be granted; and

(vii) costs.

[3] The basis of the applicants' application are as follows:

(i) that the third respondent had unlawfully and wrongfully delegated her decision-making power conferred under s. 32 of the AELA to the Cabinet of the Government of Malaysia;

(ii) that the decision dated 15 August 2019 as announced by the 30th respondent (as the authoritative body) was the decision of the Cabinet and not the third respondent;

(iii) the decision of the Cabinet of the Government of Malaysia made on 15 August 2019 reversing the decision of the appropriate authority dated 4 December 2018 is illegal and is therefore *ultra vires* of s. 32 of the AELA and is therefore null and void.

[4] After detailed considerations of the applicants' application for judicial review ("encl. 10"), the statement filed pursuant to O. 53 r. 3(2) of the ROC 2012, the applicants' joint affidavit-in-support, the applicants' joint affidavit-in-reply, the applicants' second joint affidavit-in-reply, the applicants' joint affidavit-in-reply (2), the respondents' affidavit-in-reply and written submissions as well as oral submissions by all the parties, I dismissed the applicants' application in encl. 10. This judgment contains the full reasons for my decision.

Background Facts

[5] The applicants are residents of Kuantan, Pahang.

[6] The 31st respondent, Lynas had obtained approval of the mining licence to produce "rare earth oxides and carbonates" in the Gebeng Industrial Area "GIA" on 22 January 2018. The approval was given subject to conditions, especially to fulfil the various provisions in the AELA and the Environmental Quality Act 1974 (EQA).

[7] The 31st respondent, Lynas through letters dated 6 March 2012 and 12 March 2012 respectively had provided an undertaking to remove the Lynas Advance Material Plant ("LAMP") residue from Malaysia, if necessary.

[8] On 10 December 2012, a joint media statement was issued by the relevant authorities, Minister of Natural Resources and Environment and the Minister of Health Ministry, Ministry of Science, Technology and Innovation (MOSTI) and Ministry of Health that the temporary operational licence ("TOL") issued was imposed with specific condition that the 31st respondent is to send out of Malaysia all residues produced at LAMP, which included the product produced made from the said residue. The Cabinet has duly endorsed this specific condition and in the event, the 31st respondent fails to comply with this specific condition, the 30th respondent has the right under s. 22 of the AELA to suspend or terminate the 31st respondent's licence and order the 31st respondent to cease its operations immediately.

[9] Pursuant to the application, the 30th respondent granted the following licence to the 31st respondent:

(i) a TOL for the period 3 September 2012 till 2 August 2014 was granted (with conditions) (first licence);

(ii) full operational licence for the period 3 September 2014 till 2 September 2016 was granted (with conditions) (second licence);

(iii) full operational licence for the period 3 September 2016 till 2 September 2019 was granted (with conditions) (third licence); and

(iv) full operational licence for the period 3 September 2019 till 2 March 2020 (with conditions) ("fourth licence").

[10] On 9 May 2018, after the general election, the new Pakatan Harapan Government was elected into power. The new Government had decided to form a committee to review the Lynas project. They then formed a committee to evaluate the Lynas project.

[11] Hence on 15 October 2018, it was announced that an executive review committee ("ERC") had been formed to look into the operations of Lynas. The first applicant Mr Tan Bun Teet (Chairman of Save Malaysia Stop Lynas ("SMSL")) appeared before the ERC and forwarded the presentation by SMSL to the ERC dated 5 November 2018 together with the relevant documents for their consideration.

[12] On November 2018, the ERC presented its report – Laporan Jawatankuasa Executive Penilaian Operasi LAMP to the Minister of Energy, Science, Technology, Environment and Climate Change ("MESTECC").

[13] Through letter dated 4 December 2018, the 30th respondent wrote to the 31st respondent informing the imposition of pre-conditions for the renewal of the operating licence expiring on the 2 September 2019. The pre-conditions are as follows:

(i) to ensure that all existing water leach purification ("WLP") residue are taken out of Malaysia before 2 September 2019;

(ii) imposition of a limit on the amount of WLP residue that can be stored in a temporary storage facility at a time for a licence to be renewed; and

(iii) based on the above pre-conditions, the WLP residue has to be taken out and no longer be allowed for research of R&D after 31 December 2018.

[14] On 3 January 2019, the 31st respondent lodged an appeal pursuant to s. 32 of the AELA against the imposition of the said pre-conditions.

[15] On 15 May 2019, the 30th respondent furnished to the 31st respondent the grounds of decision dated 30 April 2019 for the decision dated 4 December 2018.

[16] The appeal pursuant to s. 32 of the AELA was heard on 28 June 2019 in the attendance of the 31st respondent.

[17] On 30 May 2019, the first respondent, the then Prime Minister of Malaysia whilst in Tokyo and Kyoto, Japan made the following statements:

> The Star online 30.5.2019 – Article titled: **Dr M: Malaysia to let Lynas continue running rare earths plant (updated)**
>
> TOKYO (Reuters): Prime Minister Tun Dr Mahathir Mohamad said on Thursday (May 30) that Malaysia will allow Australian rare earths producer Lynas Corp to keep operating its rare earths processing plant in Gebeng, Pahang.
>
> "We think we'll have to renew the licence", Dr Mahathir told reporters at a news conference in Tokyo, adding Malaysia did not want to lose such a large investment. Dr Mahathir is in Japan to attend a business conference. (emphasis added)

[18] Fuziah Saleh of PKR *vide* FMT online article dated 4 August 2019, stated that Malaysia is in a jam over the Lynas issue such as the main beneficiary of the processed rare earths is Japan, which has provided funding for the Government in the form of Samurai bonds. In the same article, it was reported that the third respondent has intimated that the Government will announce its decision on the 31st respondent's licence renewal.

[19] On 13 August 2019, the third respondent issued a letter to 30th respondent informing a Cabinet decision to extend the 31st respondent's operating licence. The third respondent also instructed the 30th respondent to take the necessary action in relation to the imposition of the pre-conditions imposed to renew the licence on 4 December 2018 and to publish the said decision through media statement on 15 August 2019.

[20] The 30th respondent responded to the said letter on 13 August 2019 and requested several conditions to be imposed for the licence.

[21] The third respondent upon scrutinising the said letter had written another letter dated 14 August 2019 stating for several conditions to be attached to the licence.

[22] On 15 August 2019, the 30th respondent issued a media statement on the renewal of Lynas's licence for another six months with conditions as follows:

(i) permanent disposal facility plans and location for the WLP must be identified and to obtain the State Government's approval;

(ii) the cracking plant must be built outside Malaysia within four years; and

(iii) 0.5% of revenue would go to the Government as additional collateral for the cracking and leaching to be operated outside Malaysia.

[23] On 16 August 2019, it was reported by the NST that the third respondent, the MESTECC Minister had maintained her stand of her views on 4 December 2018 decision and the renewal of the 31st respondent's licence on 15 August 2019 as announced by the 30th respondent was the final decision of the Cabinet.

[24] MESTECC *vide* its letter dated 23 October 2019 addressed to the first applicant that MESTECC has confirmed the said decision dated 15 August 2019 as the decision of the Cabinet of Malaysian Government.

[25] The applicants filed this present judicial review application challenging the decision made by the third respondent on the appeal by the 31st respondent relating to the imposition of the pre-conditions to renew the licence.

[26] It is relevant to note that on 16 February 2020, the 30th respondent had extended the fifth licence for the period of 3 March 2020 until 2 March 2023.

The Law

[27] Judicial review may be granted on the grounds of illegality, irrationality and/or procedural impropriety.

[28] This principle can be found in the case of *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where Lord Diplock had this to say at pp. 410 and 411:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety" ...
>
> By "illegality" as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality", I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. ...
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice.

[29] In the same case, Lord Roskill at p. 414 mentioned the following:

> Before considering the rival submissions in more detail, it will be convenient to make some general observations about the process now known as judicial review. Today, it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described – by no means critically – as an upsurge of judicial activism. Historically, the use of the old prerogative writs of *certiorari*, prohibition and *mandamus* was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with

that branch of judicial review which is concerned with the control of Executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far, this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, *Wednesbury* principles (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1984] 1 KB 223). The third is where it has acted contrary to what are often called "principles of natural justice". As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case, as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.

My noble and learned friend, Lord Diplock, in his speech, has devised a new nomenclature for each of these three grounds, calling them respectively "illegality", "irrationality" and "procedural impropriety" – words which, if I may respectfully say so, have the great advantage of making clear the differences between each ground.

[30] Although *Council of Civil Service Unions & Ors v. Minister for the Civil Service* has been assimilated into Malaysian jurisprudence through a plethora of cases, the Malaysian courts have, since the decision of the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 AMR 433; [1997] 1 MLJ 145; [1996] 1 MLRA 725; [1996] 1 MELR 71, made inroads and held that decisions may be reviewed on grounds of illegality, irrationality and proportionality not only on the decision-making process, but also on the merits.

Issues

[31] Having perused the cause papers, I am of the view that the issues to be determined are as follows:

(i) Whether the decision dated 15 August 2019 in reversing the decision of the appropriate authority dated 4 December 2018 is the decision of the Cabinet or the third respondent.

(ii) Whether the decision dated 15 August 2019 in reversing the decision of the appropriate authority dated 4 December 2018 is *ultra vires* with s. 32 of the AELA.

(iii) Whether the decision dated 15 August 2019 in reversing the decision of the appropriate authority dated 4 December 2018 is reviewable.

(iv) Whether the action has become academic.

Decision Of The Court

First Issue

Whether The Decision Dated 15 August 2019 In Reversing The Decision Of The Appropriate Authority Dated 4 December 2018 Is The Decision Of The Cabinet Or The Third Respondent?

[32] It is the applicants' case that the third respondent had unlawfully and wrongfully delegated her decision-making power conferred under s. 32 of the AELA to the Cabinet of the Government of Malaysia and the decision dated 15 August 2019 as announced by the 30th respondent was the decision of the Cabinet and not the third respondent.

[33] Therefore, the decision of the Cabinet of the Government of Malaysia made on 15 August 2019 reversing the decision of the appropriate authority dated 4 December 2018 is illegal and therefore *ultra vires* of s. 32 of the AELA and is therefore null and void.

[34] During the hearing, the applicants had referred to the letter dated 13 August 2019 (exh. H2 of the 30th respondent's affidavit-in-reply) and stated that based on para. 2 of the said letter, it is clear that the Cabinet made the decision.

[35] The respondents vehemently argued that the applicants had misunderstood the content of the said letter. First, the letter is prepared and signed by the third respondent. The said letter is addressed to the 30th respondent.

[36] The respondents further stated that the letter contains two important information, as follows:

(i) at para. 2, the third respondent stated that the Cabinet had agreed that the Lynas's operation licence to be extended for six months upon its expiry on 2 September 2019 ("Cabinet's decision"); and

(ii) at para. 3, the third respondent instructed the 30th respondent to act in line with the said Cabinet's decision on the imposition of the pre-conditions stated in the letter dated 4 December 2018.

[37] The respondents submitted that the second decision is in relation to the appeal lodged by the 31st respondent on the pre-conditions imposed by the 30th respondent dated 4 December 2018. Herein, the applicants contended that the third respondent did not make the decision but was dictated by the Cabinet.

[38] As the content of the said letter is crucial, I reproduced the said letter dated 13 August 2019 as follows:

MENTERI TENAGA, SAINS, TEKNOLOGI, ALAM SEKITAR DAN PERUBAHAN IKLIM
MINISTER OF ENERGY, SCIENCE, TECHNOLOGY, ENVIRONMENT AND CLIMATE CHANGE

MESTECC/YBM-1/1 Jld. 3 (54)
13 Ogos 2019

YBhg. Datuk Ir. Ahmad Fauzi bin Hasan
Pengerusi
Lembaga Perlesenan Tenaga Atom
Batu 24 Jalan Dengkil
43800 Dengkil, Selangor

YBhg. Datuk,

PEMAKLUMAN KEPUTUSAN PELANJUTAN LESEN OPERASI *LYNAS ADVANCED MATERIALS PLANT* (LAMP) DI GEBENG, PAHANG

Dengan hormatnya saya merujuk kepada perkara di atas.

2. Untuk makluman YBhg. Datuk, **Mesyuarat Jemaah Menteri pada 5 Julai 2019** telah bersetuju supaya lesen operasi Lynas Advanced Materials Plant (LAMP) di Gebeng, Pahang **dilanjutkan selama 6 bulan** selepas tamat tempoh lesen operasi sedia ada pada 2 September 2019.

3. Dalam hubungan ini, Lembaga Perlesenan Tenaga Atom Malaysia (LPTA) adalah dipohon untuk mengambil tindakan yang sewajarnya selaras dengan keputusan Jemaah Menteri tersebut, ke atas pra-syarat pembaharuan lesen operasi Lynas Malaysia Sdn. Bhd. (Lynas) yang telah dikeluarkan oleh LPTA melalui surat bertarikh 4 Disember 2018.

4. Dalam hubungan ini, pihak LPTA juga dipohon untuk **mengeluarkan kenyataan kepada media pada 15 Ogos 2019** bagi memaklumkan pelaksanaan keputusan tersebut.

Sekian, terima kasih.

Salam hormat,

(YEO BEE YIN)

Aras 7, Blok C5, Kompleks C, Pusat Pentadbiran Kerajaan Persekutuan, 62662 Putrajaya
Tel : 603 - 8885 8013 Faks : 603 - 8889 1618
Laman Web : www.mestecc.gov.my

Level 7, Block C5, Complex C, Federal Government Administrative Centre, 62662 Putrajaya
Tel : 603 - 8885 8013 Fax : 603 - 8889 1618
S/N 0oAjDI4c5Um0hg1W7qbnNQ *Website : www.mestecc.gov.my*
**Note : Serial number will be used to verify the originality of this document via eFILING portal

[39] Media release dated 15 August 2018 from Lembaga Pelesenan Tenaga Atom (exh. A11, applicants' affidavit-in-support, encl. 4) is also reproduced herein for ease of reference:

SIARAN MEDIA

LEMBAGA PERLESENAN TENAGA ATOM (LPTA)

15 OGOS 2019

PEMINDAHAN PROSES "CRACKING AND LEACHING" KE LUAR NEGARA DAN PEMBINAAN PDF ANTARA SYARAT LESEN OPERASI LYNAS

PUTRAJAYA, 15 OGOS 2019: Susulan daripada kenyataan awam yang telah dibuat oleh YAB Perdana Menteri dan keputusan Jemaah Menteri, Lembaga Perlesenan Tenaga Atom (LPTA) telah membaharui lesen operasi Lynas Malaysia Sdn Bhd (Lynas) selama ENAM bulan.

Antara syarat-syarat yang telah ditetapkan adalah:

(i) Lynas hendaklah mengemukakan perancangan bagi pembinaan kemudahan (facility) "*Cracking and Leaching*" di luar negara bagi tujuan **memindahkan proses tersebut** yang kini dijalankan di lojinya di Gebeng Kuantan, **keluar dari Malaysia**. Kemudahan *Cracking and Leaching* di luar negara hendaklah dibina dan mula beroperasi **dalam tempoh 4 tahun** dari tarikh sah lesen. Selepas kemudahan "*Cracking and Leaching*" mula beroperasi di luar negara, pemegang lesen **tidak lagi dibenarkan menghasilkan residu radioaktif** yang melebihi 1 *Becquerel* per gram di lojinya di Gebeng, Kuantan.

(ii) Lynas hendaklah:

(a) mengenalpasti tapak spesifik untuk pembinaan **Kemudahan Pelupusan Kekal (*Permanent Disposal Facility*, PDF)** dan hendaklah mengemukakan **kebenaran secara bertulis daripada Kerajaan Negeri** bagi penggunaan tapak tersebut sebagai PDF. Pemegang lesen juga hendaklah mengemukakan pelan perancangan pembinaan PDF yang lengkap serta pelan pembiayaan yang mencukupi bagi menampung keseluruhan pembinaan dan operasi PDF; atau

b) mengemukakan kebenaran rasmi secara bertulis daripada pihak berkuasa mana-mana negara untuk membawa keluar residu *Water Leach Purification* (WLP) ke negara tersebut;

(iii) Lynas hendaklah **menamatkan semua aktiviti penyelidikan dan pembangunan (*Research and Development*, R&D) berkaitan penggunaan semula residu radioaktif WLP sebagai *Condisoil* dalam bidang pertanian** dan hendaklah mengemukakan 0.5 peratus (%) daripada jualan kasar setiap tahun yang diletapkan untuk usaha R&D sebelum ini kepada Kerajaan Malaysia sebagai cagaran tambahan sehingga kemudahan "*Cracking and Leaching*" di luar negara mula beroperasi.

Syarat-syarat ini diputuskan setelah Kerajaan Persekutuan Australia dan Kerajaan Negeri Western Australia memaklumkan kepada Malaysia bahawa pihaknya tidak akan menerima penghantaran balik residu radioaktif WLP Lynas.

Syarat-syarat di atas diputuskan ini juga adalah berdasarkan syor yang dibuat oleh Jawatankuasa Eksekutif Penilaian Operasi Lynas Advanced Materials Plant dalam laporannya pada November 2018.

Pembinaan PDF perlu disegerakan untuk meminimakan risiko timbunan residu radioaktif WLP yang kini terkumpul melebihi 580,000 tan di kemudahan penstoran sementara (*residue storage facility*, RSF) yang terdedah kepada ancaman bencana alam seperti banjir besar.

LPTA akan memantau rapi serta memastikan pembinaan dan pengendalian PDF mengikut piawaian antarabangsa.

- TAMAT -

Sebarang pertanyaan lanjut, sila hubungi:

Tn. Hj. Zul Helmi bin Ghazali
Ketua Unit
Unit Komunikasi Korporat
Lembaga Perlesenan Tenaga Atom (LPTA)
No. Tel: 03-89225888

Dikeluarkan pada 15 Ogos 2019, 5.00 petang

[40] On the first issue, whether the decision dated 15 August 2019 in reversing the decision of the appropriate authority dated 4 December 2018 is the decision of the Cabinet or the third respondent (the Minister of MESTECC), we must foremost observe the media release dated 15 August 2019 made by the 30th respondent.

[41] It is clearly stated in the media release dated 15 August 2019 that:

> **PUTRAJAYA, 15 OGOS 2019**: Susulan daripada kenyataan awam yang telah dibuat oleh YAB Perdana Menteri dan **keputusan Jemaah Menteri**, Lembaga Perlesenan Tenaga Atom (LPTA) telah membaharui lesen operasi Lynas Malaysia Sdn Bhd (Lynas) selama ENAM bulan ...
>
> (emphasis added)

[42] The media release was made pursuant to the third respondent's disputed letter dated 13 August 2019 ("exh H2").

[43] Exhibit H2 is a letter made by the third respondent to the 30th respondent for the purpose of "Pemakluman Keputusan Perlanjutan Lesen Operasi Lynas Advanced Materials Plant (LAMP) Di Gebeng, Pahang".

[44] From the observation in that letter, it is obvious that at para. 2, the third respondent stated that the Cabinet had agreed that the Lynas's operation licence is to be extended for six months upon its expiry on 2 September 2019.

[45] Meanwhile at para. 3, it is clearly stated the third respondent instructed the 30th respondent to act in line with the said Cabinet's decision on the imposition of the pre-conditions stated in the letter dated 4 December 2018.

[46] In answering the first issue, it is crucial to determine what decision in that 15 August 2019's media release that reverse the decision of the appropriate authority dated 4 December 2018?

[47] On 4 December 2018, the 30th respondent wrote a letter to the 31st respondent informing the imposition of pre-conditions for the renewal of the operating licence expiring on 2 September 2019.

[48] Then on 3 January 2019, the 31st respondent lodged an appeal pursuant to s. 32 of the AELA against the imposition of the said pre-conditions.

[49] It is vibrant that the appeal for the decision 4 December 2018 is on the pre-conditions. Therefore, only matters decided on pre-conditions will reverse the decision of the appropriate authority dated 4 December 2018.

[50] The third respondent in her affidavit affirmed on 17 February 2020 ("encl. 18") at para. 11(c) confirmed the subject matter of the appeal as follows:

> (c) Saya menegaskan bahawa rayuan yang dikemukakan oleh pihak Lynas adalah mengenai pengenaan pra-syarat untuk membaharui lesen operasi oleh Responden Ke-30 melalui surat bertarikh 4.12.2018. Bagi mendengar rayuan tersebut saya telah menubuhkan Jawatankuasa Rayuan. Saya telah membuat keputusan berkenaan dengan pra-syarat tersebut dalam surat-surat bertarikh 13.8.2019 dan 14.8.2019;
>
> ...
>
> (f) Saya menegaskan bahawa kelulusan untuk menyambung lesen operasi Lynas telah dibuat oleh Responden Ke-30. Kelulusan tersebut adalah selaras dengan keputusan Jemaah Menteri pada 5.7.2019 dan keputusan saya melalui surat-surat bertarikh 13.8.2019 dan 14.8.2019 di bawah seksyen 32 Akta 304.

[51] In addition to that, the third respondent in her affidavit affirmed on 12 May 2020 (encl. 24) had clarified the situation as follows:

> 5. Saya menafikan perenggan 21 Afidavit Jawapan Bersama Pemohon dan selanjutnya menyatakan seperti berikut:
>
> 5.1 Surat saya bertarikh 13.8.2019 (ekshibit H2 Afidavit Jawapan Responden Ke-30) mengandungi 2 makluman berbeza iaitu mengenai persetujuan Jemaah Menteri untuk membaharui lesen operasi Responden Ke-31 dan arahan saya mengenai pengenaan pra-syarat oleh Responden Ke-30 terhadap Responden Ke-31 sebelum lesen operasi Responden Ke-31 boleh dibaharui;

5.2 Dalam membuat keputusan mengenai rayuan oleh Responden Ke-31 terhadap pengenaan pra-syarat oleh Responden Ke-30, saya telah menubuhkan Jawatankuasa Rayuan sebagaimana dinyatakan di perenggan 6.8 hingga 6.10 Afidavit Jawapan Responden Pertama hingga Ke-29. Jawatankuasa tersebut telah menjalankan perbicaraan dan mengemukakan syor kepada saya. Setelah menimbangkan segala perkara dan bukti yang dikemukakan semasa pendengaran Jawatankuasa Rayuan tersebut dan syor yang dikemukakan oleh Jawatankuasa Rayuan, saya telah membuat keputusan dan memaklumkan Responden Ke-30 melalui surat bertarikh 13.8.2019 di Ekshibit H-2 Afidavit Jawapan Responden Ke-30 tersebut;

5.3 Saya menegaskan bahawa dalam membuat keputusan terhadap rayuan yang difailkan oleh Responden Ke-31 mengenai pra-syarat yang dikenakan oleh Responden Ke-30, saya boleh membuat perintah untuk mengesahkan atau mengetepikan keputusan yang dibuat oleh Responden Ke-30 atau membuat perintah yang pada hemat saya sesuai sebagaimana diperuntukkan di bawah Seksyen 32 Akta 304. Sehubungan itu dalam surat di Ekshibit H-2 Afidavit Jawapan Responden Ke-30 saya telah mengarahkan Responden Ke-30 untuk mengambil tindakan selaras dengan keputusan Jemaah Menteri mengenai pengenaan pra-syarat yang dikenakan melalui surat bertarikh 4.12.2018 di Ekshibit H-1 Afidavit Jawapan Responden Ke-30;

5.4 Saya mengeluarkan surat bertarikh 14.8.2019 (Ekshibit H-4 Afidavit Jawapan Responden Ke-30) sebagai menjawab surat Responden Ke-30 bertarikh 13.8.2019 (Ekshibit H-3 Afidavit Jawapan Responden Ke-30). Surat 14.8.2019 bukan merupakan keputusan Jemaah Menteri. Namun begitu dalam surat tersebut saya telah mengambil maklum akan keputusan Responden Ke-30 untuk menyambung lesen operasi Responden Ke-31. Saya juga telah memohon agar syarat-syarat tambahan dikenakan seperti dinyatakan di perenggan 3 surat 14.8.2019 dan perenggan 6.14 Afidavit Jawapan Responden Pertama hingga Ke-29; dan

5.5 Keputusan bertarikh 15.8.2019 yang diumumkan oleh Responden Ke-30 bukanlah berdasarkan rayuan yang dibuat oleh Responden Ke-31. Keputusan tersebut adalah terhadap permohonan pembaharuan lesen operasi oleh Responden Ke-31;

6. Saya menafikan perenggan 22 hingga 30 Afidavit Jawapan Bersama Pemohon. Saya menegaskan tiada kekeliruan yang timbul melalui surat-surat saya bertarikh 13.8.2019 (Ekshibit H-2) dan 14.8.2019 (Ekshibit H-4). Sekali lagi ingin saya tegaskan bahawa keputusan untuk memperbaharui lesen operasi Responden Ke-31 dibuat oleh Responden Ke-30. Hanya terdapat satu (1) rayuan sahaja di hadapan saya iaitu mengenai pra-syarat yang dikemukakan oleh Responden ke-30. Saya telah membuat keputusan mengenai pra-syarat tersebut melalui surat bertarikh 13.8.2019. Saya juga telah meminta beberapa syarat tambahan dikenakan terhadap Responden Ke-31 sebagaimana surat bertarikh 14.8.2019.

7. Saya juga menegaskan bahawa saya tidak pernah mewakilkan kepada Jemaah Menteri untuk memutuskan rayuan Responden Ke-31 mengenai pra-syarat yang dikenakan oleh Responden Ke-30. Sekali lagi saya

tegaskan keputusan bertarikh 15.8.2019 adalah mengenai pembaharuan lesen operasi Responden Ke-31 dan berbeza dengan keputusan rayuan oleh Responden Ke-31 yang saya putuskan melalui surat 13.8.2019.

[52] From the above, it is crystal clear that the first to 28th respondents did not make the decision in relation to the appeal lodged by the 31st respondent. The Cabinet had only decided to renew the licence. Such decision is distinct and different from the appeal lodged by the 31st respondent.

[53] The third respondent was the one who instructed the 30th respondent to act in line with the said Cabinet's decision on the imposition of the pre-conditions which is the subject matter of the appeal (refer to exh. H2).

[54] Thus, only the decision with regards to pre-conditions can reverse the decision of the appropriate authority dated 4 December 2018.

[55] Nowhere it is mentioned that the Cabinet themselves decided on the pre-conditions. The Cabinet had only decided on the renewal of the licence but not on the pre-conditions.

[56] Henceforth, having scrutinised and considered all the exhibits filed in this case, I am of the opinion that the decision dated 15 August 2019 reversing the decision of the appropriate authority dated 4 December 2018 on the imposition of the pre-conditions is not the decision of the Cabinet.

[57] It is my considered view that it is the third respondent's decision in relation to the appeal subject matter that is the imposition of the pre-conditions.

Second Issue

Whether The Decision Dated 15 August 2019 In Reversing The Decision Of The Appropriate Authority Dated 4 December 2018 Is *Ultra Vires* With Section 32 Of The AELA?

[58] Section 32 of the AELA is reproduced herein *in verbatim* for the ease of reference:

32. Appeals

(1) Any person who is dissatisfied with any decision of the appropriate authority made under this Act may within thirty days after being notified of such decision give notice of appeal in writing to the Minister in the prescribed manner.

(2) The Minister shall as soon as is practicable cause to be served on the appellant a written notice specifying the date, time and place at which the appeal is to be heard:

Provided that the date so specified shall in no case be earlier than thirty days from the date of service of such notice.

(3) The grounds of appeal shall be submitted to the Minister not less than ten days before the date fixed for the hearing of the appeal.

A (4) At the hearing of the appeal the appellant may be present either in person or by counsel and the Minister may call for such evidence as he thinks fit.

(5) The Minister may, after hearing the appeal, make an order confirming or setting aside the decision of the appropriate authority or make such
B other order as he thinks fit, and the order of the Minister shall be final and shall not be subject to any appeal or review in any court.

(6) All parties concerned shall give effect to the decision of the Minister in the matter.

[59] The applicants contended that the decision of the Cabinet made on
C 15 August 2019 in reversing the decision of the appropriate authority dated 4 December 2018 is illegal and therefore *ultra vires* of s. 32 of the AELA and is therefore null and void.

[60] It is pertinent to note my finding on the first issue that the decision made on 15 August 2019 in reversing the decision of the appropriate
D authority dated 4 December 2018 is the decision of the third respondent.

[61] Through exh. H2 which is the letter dated 13 August 2019, the third respondent being the Minister in charge of the AELA had instructed the 30th respondent to take necessary action in relation to the imposition of the
E pre-conditions in the letter dated 4 December 2018.

[62] It appears from the evidence that the third respondent's instruction was in line with s. 32 of the AELA. Sub-section 32(5) of the AELA specifically provides for three options to the third respondent after hearing an appeal which are as follows:

F (i) confirming the decision;

(ii) set aside the decision; or

(iii) make any order as she thinks fit.

G **[63]** It is my view that the third respondent's instruction to the 30th respondent falls under the third category of the decision under sub-s. 32(5) of the AELA that is to make any order as she thinks fit.

[64] The said instruction is indeed a decision or an order within the ambit of s. 32 of the AELA. The third respondent in her affidavits stated that she
H had made the decision in relation to the said appeal through the letter dated 13 August 2019 (exh H2).

[65] Paragraphs 5.3, 5.4 and 7 of the third respondent's affidavit which was affirmed on 12 May 2020 (encl. 24) provide as follows:

I 5.3 Saya menegaskan bahawa dalam membuat keputusan terhadap rayuan yang difailkan oleh Responden Ke-31 mengenai pra-syarat yang dikenakan oleh Responden Ke-30, saya boleh membuat perintah untuk mengesahkan atau mengetepikan keputusan yang dibuat oleh Responden

Ke-30 atau membuat perintah yang pada hemat saya sesuai sebagaimana diperuntukkan di bawah Seksyen 32 Akta 304. Sehubungan itu dalam surat di Ekshibit H-2 Afidavit Jawapan Responden Ke-30 saya telah mengarahkan Responden Ke-30 untuk mengambil tindakan selaras dengan keputusan Jemaah Menteri mengenai pengenaan pra-syarat yang dikenakan melalui surat bertarikh 4.12.2018 di Ekshibit H-1 Afidavit Jawapan Responden Ke-30;

5.4 Saya mengeluarkan surat bertarikh 14.8.2019 (Ekshibit H-4 Afidavit Jawapan Responden Ke-30) sebagai menjawab surat Responden Ke-30 bertarikh 13.8.2019 (Ekshibit H-3 Afidavit Jawapan Responden Ke-30). Surat 14.8.2019 bukan merupakan keputusan Jemaah Menteri. Namun begitu dalam surat tersebut saya telah mengambil maklum akan keputusan Responden Ke-30 untuk menyambung lesen operasi Responden Ke-31. Saya juga telah memohon agar syarat-syarat tambahan dikenakan seperti dinyatakan di perenggan 3 surat 14.8.2019 dan perenggan 6.14 Afidavit Jawapan Responden Pertama hingga Ke-29; dan

...

7. Saya juga menegaskan bahawa saya tidak pernah mewakilkan kepada Jemaah Menteri untuk memutuskan rayuan Responden Ke-31 mengenai pra-syarat yang dikenakan oleh Responden Ke-30. Sekali lagi saya tegaskan keputusan bertarikh 15.8.2019 adalah mengenai pembaharuan lesen operasi Responden Ke-31 dan berbeza dengan keputusan rayuan oleh Responden Ke-31 yang saya putuskan melalui surat 13.8.2019.

[66] Thereupon, there is no issue and evidence that the third respondent had wrongfully and unlawfully delegated her decision-making power conferred under s. 32 of the AELA to the Cabinet of the Government of Malaysia.

[67] The case of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281; [2019] 6 MLRA 494 is not applicable in this matter. In that case, the Federal Court found that the letter of the decision on appeal to grant the extension of time to the developer was signed on behalf of the Controller. This is contrary to reg. 12 of the Housing Development (Control and Licensing) Regulations 1989 which empowers the Minister to make such decision. There was also no affidavit by the Minister to clarify on this matter.

[68] Nevertheless, the decision in this judicial review application concerns the appeal under s. 32 of the AELA. The decision is apparently made by the third respondent that is the Minister (refer to the third respondent's affidavits – encl. 18 and encl. 24 as well as exh. H2).

[69] The third respondent had lawfully made her decision in relation to the appeal sought by the 31st respondent within her discretion provided under sub-s. 32(5) of the AELA.

[70] The third respondent did not in any way delegated her decision making power under s. 32 of the AELA to the Cabinet.

[71] That being the case, I am of the considered opinion that the said decision is not *ultra vires* of s. 32 of the AELA. The decision is also not tainted with illegality or procedural impropriety to warrant an intervention of this court.

Third issue

Whether The Decision Dated 15 August 2019 In Reversing The Decision Of The Appropriate Authority Dated 4 December 2018 Is Reviewable?

[72] For this third issue, sub-s. 32(5) of the AELA is reproduced for ease of reference:

> (5) The Minister may, after hearing the appeal, make an order confirming or setting aside the decision of the appropriate authority or make such other order as he thinks fit, and **the order of the Minister shall be final and shall not be subject to any appeal or review in any court**.
>
> (emphasis added)

[73] It is my view on this issue that the decision made by the third respondent is not amenable to judicial review. It is a final decision and shall not be subjected to any review by any court as provided under s. 32(5) of the AELA.

[74] The Federal Court in a very recent case of *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 4 CLJ 1; [2021] 2 MLJ 822; [2021] 3 MLRA 260 took the view that an ouster clause is constitutional. The ouster clause was validly enacted by Parliament pursuant to the power vested in it by art. 121(1) of the FC.

[75] In *Rovin Joty* the six appellants appealed against the decision of the learned Judicial Commissioner which dismissed the appellants' application for a writ of *habeas corpus*. The six appellants were ordered to be detained under s. 19A(1) of the Prevention of Crime Act 1959 ("POCA") for a period of two years. Pursuant to the order, the appellants are to be detained at the respective Pusat Pemulihan Khas (PPK).

[76] The issue raised before the Federal Court was whether s. 15B of the POCA (an ouster clause provision) limits the exercise of judicial review power and therefore is *ultra vires* art. 121(1) of the FC.

[77] In *Rovin Joty*, the Federal Court also elaborated on the historical perspective and intention of the framers and the founding fathers of the FC in the drafting of the relevant articles in the FC, namely on powers of the court, *vis-à-vis* on judicial review and laws on preventive detention. Of significance is the role played by the Reid Commission which was tasked

with the drafting of the FC. The Federal Court further held that a Constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles that shaped its structure into what it is today. It was held as follows:

> [52] The Reid Commission did not consider the division of various three branches of powers to be constitutionally contrary to the doctrine of separation of powers. The Commission had addressed and considered at length during the drafting process, any possible potential discordance between this arrangement and the doctrine of separation of powers. It was originally proposed by Sir Ivor Jennings for the tentative draft provisions on "Fundamental Liberties". Of significance to those proposed tentative provisions which are relevant for present purpose were art. 1 "The Rule of Law", art. 2 "Enforcement of the Rule of Law" and art. 3 "Liberties of the Person" (CO 889/2 at 36-37 R(A)BOA). In the "Comments on the Draft" (CO 889/2 at 38-39 R(A)BOA), Sir Ivor Jennings explained that the provision for enforcement by way of judicial review and *habeas corpus* was meant to be extended to the whole Constitution and not merely to the Chapter on Fundamental Liberties.
>
> [53] The Commission was clear on the issue of preventive detention and emergency provisions, that they should be treated narrowly from the general remedies proposed for the enforcement of liberty of the person. Questions were raised on the potential invalidation of an otherwise valid statutory ouster clauses in the seemingly absolute terms that it was drafted. After much deliberation and consultation with London experts it was finally decided that it was impracticable to provide the limits of the Constitution for all possible contingencies. It is considered that sufficient remedies can best be provided by ordinary law. As to the type and extent of remedy available is a matter for the Legislature to decide.
>
> [54] Thus, it was decided by the Reid Commission that federal law may prescribe what the Legislature considers as "sufficient remedy" to meet the demand of the circumstances. These provisions were formulated in such a manner after numerous discussions, meetings and mature consideration between the committees in the Reid Commission.
>
> [55] It is to be observed that Articles 149 (laws against subversion, organised violence and acts prejudicial to public order), 150 (laws on the proclamation of emergency) and 151 (restrictions on preventive detainees) were specially drafted and provided in the FC as separate and distinct provisions from Part II of the FC under "Special Powers against subversion, organised violence, and acts and crimes prejudicial to the public and emergency powers". In this regard, it is relevant to refer to the Report of the Federation of Malaya Constitutional Commission by the Reid Commission in 1957 which succinctly explained the powers accorded to Parliament to enact laws in relation to preventive legislations, at p 74 paragraph 172 and p 75 at paragraph 174 which stated:
>
> > 172. Neither the existence of fundamental rights nor the division of powers between the Federation and the States ought to be permitted to imperil the safety of the State or the preservation of

> a democratic way of life. The Federation must have adequate power in the last resort to protect these essential national interests. But in our opinion infringement of fundamental rights or of State rights is only justified to such an extent as, may be necessary to meet any particular danger which threatens the nation.
>
> ...
>
> 174. To deal any further attempt by any substantial body of persons to organise violence against persons or property by a majority we recommend that parliament should be authorised to enact provisions design for that purpose notwithstanding that such provisions may involve infringements of fundamental rights or State rights.

[78] Based on the above reasons, the Federal Court in a majority judgment dismissed the appeal and held that s. 15B of the POCA is constitutional.

[79] Based on this recent Federal Court's decision, it is my view that the ouster clause in sub-s. 32(5) of the AELA was validly enacted by Parliament and the provision clearly states that the order of the Minister shall be final and shall not be subject to any appeal or review in any court.

[80] Based on the above authorities I would therefore answer the third issue in the negative. The decision made by the third respondent is not reviewable based on the ouster clause under s. 32(5) of the AELA (see also *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750; [2021] 3 MLRA 1).

Fourth Issue

Whether The Action Has Become Academic?

[81] In this judicial review application, it is not disputed that the 30th respondent had extended the 31st respondent's operating licence for the fifth time from the period of 3 March 2020 to 2 March 2023.

[82] The decision that the applicants challenge in this judicial review relates to the issuance of the fourth licence to the 31st respondent.

[83] The fourth licence expired on 2 March 2020 and on 26 February 2020, the 31st respondent has been issued with the fifth licence to operate the said rare earth facility for the period of 3 March 2020 to 2 March 2023.

[84] It is the submission of the respondents that this entire judicial review is academic as there is no live issue to be determined by this court. The reliefs sought by the applicants have no value and incapable of being performed.

[85] In *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2020] 3 CLJ 593; [2020] 4 MLJ 133 the Federal Court by majority held that the test in determining whether a matter is abstract or academic is whether there is in existence a matter in actual controversy between the parties which will affect them in some way.

[86] Further, in *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener)* [2018] 10 CLJ 129; [2020] 4 MLJ 773; [2018] 5 MLRA 345, the Federal Court was of the same view. It was held that it is not a function of the courts to decide hypothetical questions which do not impact on the parties before them.

[87] In this fourth issue, I take the view that this application for judicial review is academic since the issue or the matter between the parties is no longer in existence. The renewal of the fourth licence which was in issue had been overtaken by event and the period of the licence had already expired. Moreover, the prayer (iv) sought by the applicant is also academic since the third respondent is no longer the Minister in charge.

Conclusion

[88] Having considered all the four main issues in this application, it is my opinion that the decision dated 15 August 2019 is a lawful and legal decision in line with s. 32 of the AELA. The decision is not amenable to judicial review.

[89] I am also of the view that Lynas has not breached any rules and/or regulations at the LAMP. More importantly, there is no evidence of any procedural impropriety, irrationality or unreasonableness and/or illegality on the part of the respondents in issuing the fourth licence to Lynas.

[90] Based on the above, this application for judicial review is hereby dismissed. Global costs of RM20,000 without allocatur to be paid by the applicants to all the respondents except to the 31st respondent where the applicants are to pay costs in the sum of RM20,000 subject to allocatur.